

LaSalle Bus Service, Inc. and Freddie L. Bowles.
Cases 29–CA–22682 and 29–CA–22859

August 10, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS HURTGEN
AND BRAME

On December 14, 1999, Administrative Law Judge D. Barry Morris issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, LaSalle Bus Service, Inc., Brooklyn, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following paragraphs for 2(a) and reletter the subsequent paragraphs.

"(a) Within 14 days from the date of this Order, offer Freddie L. Bowles full reinstatement to his former position, or if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed.

"(b) Make whole Freddie L. Bowles, Jermaine Phillip, Camilo Marin, Lionel Merilien, and Joe Frink for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision."

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In view of the record ambiguity as to the time of reinstatement, we leave to compliance to determine the amount of loss of earnings and benefits, accrued by the four discriminatees, Joe Frink, Camilo Marin, Lionel Merilien, and Jermaine Phillip.

Member Brame notes that the judge, based on his crediting of employee Joe Frink's testimony, found that the Respondent offered reinstatement to discriminatees Frink, Marin, and Phillip on April 12, 1999. Because the record shows that Frink testified that the Respondent told employees the previous Friday night, April 9, 1999, that they "still had [their] jobs," Member Brame finds that the employees were reinstated that evening, rather than the following Monday, April 12.

Carlos Colon-Macharg and Larry Singer, Esqs., for the General Counsel.

Norman Turk, Esq., of Brooklyn, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge. This case was heard before me in Brooklyn, New York, on October 28, 1999.¹ On charges filed on April 13 and July 8, a consolidated complaint was issued on July 23, alleging that LaSalle Bus Service, Inc. (the Respondent) violated Section 8(a)(1) of the National Labor Relations Act, as amended (the Act). Respondent filed an answer denying the commission of the alleged unfair labor practices.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally, and file briefs. Briefs were filed by the parties on December 3.

On the entire record of the case, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New York corporation, with its principal office and place of business in Brooklyn, New York, has been engaged in the business of providing bus transportation for various school districts. Respondent has not denied, and it is therefore admitted, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

Freddie L. Bowles, also known as (DC), was a mechanic for Respondent. He also did auto bodywork for the Company. On April 8, Errol Brown, another mechanic, was discharged. The following morning the mechanics discussed among themselves the fact that Brown was discharged and decided to strike. Bowles testified that he then asked Mel Barbera, the dispatcher, what happened to Brown. Bowles testified that Barbera replied, "Brown was no longer with the bus company and that for the mechanics to do the company a favor and get the f—out." Bowles testified that the mechanics then went outside. After about 15 minutes, Leonard D'Amico, a supervisor, approached the group and told them that Joseph Fazzia, the president of Respondent, who was in Puerto Rico at the time, spoke to D'Amico by telephone and said that the mechanics should get their tools and the shop would be locked.

Later that morning Brown was reinstated and the mechanics went inside the building and spoke to Fazzia on speakerphone. Bowles testified that Fazzia told him, "I'm finished, get my tools and go." Bowles testified that on the following Monday he met with Fazzia in person. He testified that Fazzia told him, "[M]y services were no longer needed because I'm the one who instigated the whole thing." Bowles also testified that he spoke with Fazzia about 4 weeks later and Fazzia told him that he was the "cause of that incident."

Camilo Marin, another mechanic, appeared to me to be a credible witness. He testified that during the morning of April 9 Bowles asked Barbera "[W]hat happened to Errol?" Barbera

¹ All dates refer to 1999 unless otherwise specified.

responded, “[H]e got fired and that’s the way it is and if you don’t like it, get the f—out.” Marin testified that a little while later, while the mechanics were standing outside, D’Amico approached them and said, “Joe Fazzia said that we should all get our stuff and leave, that we’re fired.” Marin further testified that later that day the mechanic’s spoke with Fazzia by speakerphone and Fazzia told Bowles, “DC you’re over, we’re through, that’s it, you’re finished.” Marin testified that he met with Fazzia in person the following Monday, at which time Fazzia told him that, “it was DC that started this.”

Joe Frink, a mechanic for Respondent, also appeared to me to be a credible witness. He testified that on the morning of April 9, when the mechanics expressed their “displeasure” over Brown’s termination, Barbera told them to “get the f—out.” Later that morning D’Amico told them that he had spoken to Fazzia and that “we had a half an hour to get our tools and get out of the shop.” Frink testified that the following Monday, April 12, the mechanics met personally with Fazzia. He testified that Fazzia told them that, except for Bowles, “[W]e all still had our jobs.”

D’Amico testified that on the morning of April 9, when he spoke to the mechanics while they were standing outside, “everything was coming through DC.” When asked what that meant, D’Amico replied that Bowles was the “spokesman for all of them.” Later that morning D’Amico contacted Fazzia who said that the mechanics should return to work and “we’ll straighten it out on Monday.” D’Amico gave the mechanics the message but they refused to return to work. D’Amico testified that he then told the mechanics “[I]f they didn’t come back to work they would be fired.”

Fazzia testified that about 3 weeks prior to April 9 he had a discussion with Bowles at which time he told Bowles that “either he had to clean up the fleet . . . or I was going to farm the work out.” He testified that he made the decision to “farm out” the bodywork after Easter. He testified that after what transpired on Friday, April 9, “I knew it was coming, I had to make a decision that weekend whether or not I was going to keep Fred for another week . . . and that wasn’t a decision I made on Friday. It was a decision I made probably on the plane coming back from Puerto Rico.”

B. Discussion and Conclusions

1. Discharges

I credit Marin’s testimony that during the morning of April 9, while the mechanics were standing outside, D’Amico approached them and said, “Joe Fazzia said that we should all get our stuff and leave, that we’re fired.” Frink similarly testified that D’Amico told the mechanics that he had spoken with Fazzia and that “we had half an hour to get our tools and get out of the shop.” Fazzia asked Merilien to return to work on April 9, which he did. The other mechanics, however, did not return to work. Frink credibly testified that on Monday, April 12, the mechanics met personally with Fazzia. Fazzia told them that, except for Bowles, “[W]e all still had our jobs.”

The complaint alleges that Bowles, Phillip, Marin, Merilien, and Frink were discharged on April 9 for having engaged in a strike to protest Brown’s discharge. The complaint further alleges that, except for Bowles, the other mechanics were not reinstated until April 12. I find that all of the mechanics were discharged on April 9 for engaging in a strike to protest Brown’s discharge. This was protected, concerted activity. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962). Respondent’s discharge of the employees for having engaged in

such activity constitutes a violation of Section 8(a)(1) of the Act. *Waco Insulation, Inc.*, 223 NLRB 1486 (1976), enfd. in part and denied in part on other grounds 567 F.2d 596 (4th Cir. 1977); *Gatliff Coal Co. v. NLRB*, 953 F.2d 247, 251 (6th Cir. 1992). I also find that Merilien was reinstated on April 9 and that Philip, Marin, and Frink were reinstated on April 12.

2. Bowles

Bowles was discharged on April 9 along with the other mechanics. In addition, I credit Bowles’ testimony that on April 9 during the speakerphone conversation, Fazzia told him, “I’m finished, get my tools and go.” Similarly, Marin credibly testified that during that conversation Fazzia told Bowles, “DC you’re over, we’re through, that’s it, you’re finished.” While Fazzia testified that he meant that they were through “as friends,” I find that testimony to be incredulous. The plain meaning of Fazzia’s remark was that Bowles was discharged.

Bowles was the only mechanic not to be offered reinstatement. D’Amico testified that during the morning of April 9, when he spoke to the mechanics while they were standing outside, “[E]verything was coming through DC.” When asked what that meant, he replied that Bowles was the “spokesman for all of them.” In addition, I credit Bowles’ testimony that on April 12 Fazzia told him, “[M]y services were no longer needed because I’m the one who instigated the whole thing.” Similarly, I credit Marin’s testimony that on April 12 Fazzia told him that “it was DC that started this.”

Under *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board requires that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the employer’s decision. Once this is established, the burden shifts to the employer to demonstrate that the “same action would have taken place even in the absence of the protected conduct.”

I believe that the General Counsel has made a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in Respondent’s decision to discharge Bowles. Respondent argues, however, that it had intended to “farm out” the bodywork, and that was the reason for Bowles’ discharge. I have found that Bowles was discharged on April 9. Fazzia testified that after the events of April 9, “I had to make a decision that weekend whether or not I was going to keep Fred for another week . . . and that wasn’t a decision I made on Friday. It was a decision I made probably on the plane coming back from Puerto Rico.” Thus, Fazzia himself admitted that he did not make the decision to “farm out” the bodywork until *after* Bowles had already been discharged. In addition, Bowles not only did bodywork but was also a mechanic. No adequate showing has been made that there was insufficient mechanical work for Bowles to perform. Finally, while Fazzia testified that he planned to “farm out” the bodywork, no documentation was introduced to support that claim nor was any adequate showing made of when the supposed farming out of the work was to take place. Accordingly, I find that Respondent has not satisfied its burden of showing that the “same action would have taken place even in the absence of the protected conduct.” *Wright Line*, supra, 251 NLRB at 1089. I therefore find that Respondent’s discharge of Bowles and its failure to offer him reinstatement, violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By discharging Bowles, Phillip, Marin, Merilien, and Frink for activities protected by the Act, and by failing to offer reinstatement to Bowles, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

3. The aforesaid unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find it necessary to order Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent having unlawfully discharged Freddie L. Bowles, Jermaine Phillip, Camilo Marin, Lionel Merilien, and Joe Frink, I shall order Respondent to make them whole for any loss of earnings that they may have suffered from the time of their discharges until Respondent's offers of reinstatement. All of the mechanics except for Bowles have been reinstated. With respect to Bowles, I shall order Respondent to offer him full reinstatement to his former position, or if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges. Backpay shall be computed in accordance with the formula approved in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1172 (1987).²

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

ORDER

The Respondent, LaSalle Bus Service, Inc., Brooklyn, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because they engage in protected activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Freddie L. Bowles full reinstatement to his former position, or if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges. Respondent shall also make whole Bowles, Jermaine Phillip, Camilo Marin, Lionel Merilien, and Joe Frink for any loss of earnings with interest, in the manner set forth in the remedy section of this decision.

(b) Within 14 days from the date of this Order, remove from its files any references to the unlawful discharges and within 3 days thereafter notify the employees in writing that this has

been done and that the layoffs and discharges will not be used against them in any way.

(c) Preserve, and within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Brooklyn, New York, copies of the attached notice marked "Appendix."² Copies of the notice, on forms provided by the Regional Director for Region 29 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since April 9, 1999.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge employees for activities protected by Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL within 14 days from the date of this Order, offer Freddie L. Bowles full reinstatement to his former position, or if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make whole Freddie L. Bowles, Jermaine Phillip, Camilo Marin, Lionel Merilien, and Joe Frink, for any loss of earnings they may have suffered, with interest.

WE WILL within 14 days from the date of this Order, remove from our files any references to the unlawful discharges and WE WILL, with 3 days thereafter, notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

LASALLE BUS SERVICE, INC.

² Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. Sec. 6621.

³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."